Supreme Court, U.S.
FILED

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No. (1) 09-783 OCT 29 2009

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In The Supreme Court of the United States

ALONZO R. BRINKLEY, II,

Petitioner,

v.

JON OZMINT,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1) Whether the Statute of Limitations provision of the 28 U.S.C. § 2244, the Federal Anti-terrorism and Effective Death Penalty Act (AEDPA), which as applied, place confusing and unintelligible timelines upon the filing a prisoner's constitutional right to habeas corpus, his right to effective assistance of counsel under the Sixth Amendment, and violates his right of equal protection under the Fourteenth Amendment as applied to the stated through the Fifth Amendment.

2) Whether the definition of "pending," as that word is contained within the statute of Limitations provision of the 28 U.S.C. § 2244, the Federal Anti-terrorism and Effective Death Penalty Act (AEDPA), serves to exclude as "time between courts," that is, time between the end of a trial and appeal and the beginning of post-conviction relief proceedings.

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The mandate of the Fourth Circuit sending this matter back to the District Court of South Carolina was filed August 10, 2009. Prior to that, the ORDER denying the petition for rehearing en banc was filed June 31, 2009. The notice of Judgment by the Fourth Circuit was filed June 25, 2009. These documents are reprinted, respectively in the Appendices A-F, attached hereto.

JURISDICTION

The jurisdiction of this Court to review the Judgment of the Fourth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND POLICIES AT ISSUE

Sixth Amendment to the United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Fourteenth Amendment to the United States Constitution

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2244

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

STATEMENT OF THE CASE

A. Facts Giving Rise to This Case.

The federal Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. §2244(d)(1) requires a state prisoner seeking a federal habeas corpus remedy to file his federal petition within one year after his state conviction has become "final." The statute adds, however, that the 1-year period does not include the time during which an application for state collateral review is "pending" in the state courts. §2244(d)(2). Confusion generated by the statute's interpretation, and the application of the statute to different citizens in different states, unfortunately, has caused vide variations in interpretations of case law, and has denied the Petitioner and others not only effective assistance of counsel, but equal protection of law, as widely varying and different results and interpretations are being applied across the legal spectrum of the United

States in the application of this statute's interpretation.

B. The District Court Proceedings

The now before the court arose in the South Carolina State Courts on Appellant's motion for post-conviction relief, claiming that his attorney, Mr. Jack Swerling, had rendered ineffective assistance of counsel by counseling Appellant to plead guilty, even before evidence had been received from a neurologist, Dr. Gerald Kraugh, showing that Appellant has a brain disorder which could have led to a diminished capacity defense.

The petition was denied at the trial level, then made its way through the South Carolina appellate system. Finally, on May 24, 2007, the South Carolina Supreme Court denied certiorari to that court. A Remittitur was sent to the York County Clerk of Court that same day, May 24, 2007.

On January 31, 2008, in the eighth month after the denial of cert by the South Carolina Supreme Court, Mr. Brinkley filed his petition for habeas corpus in the United States District Court for the Division of South Carolina, in Columbia. Appellee then timely filed a motion for summary judgment, arguing that, despite the plain language of the statute, Appellant did not get to count the full year to file his petition. Instead, the Appellee argued essentially that it could deduct one hundred-forty-one (141) days from the full year because way back in 2002, there was a 141 day lapse between June 3, 2002 (first Remitter to the York County Clerk) and October 22, 2002 (date petitioner filed his pro se post conviction relief motion).

The District Court granted Appellee's motion for summary judgment, and the Appellant timely requested a Certificate of Appealability. The District Court denied the Appellant's request for a Certificate of Appealability, and the Appellant timely appealed to the Fourth Circuit.

C. The Appellate Court Proceedings

On June 18, 2009, appealed to the Fourth Circuit in Richmond (Case No. 09-6551),and on June 25, 2009, the Fourth Circuit, issued a per curium opinion denying a Certificate of Appealability and dismissing the appeal, holding that "a certificate of appealability fill not issue absent a 'substantial constitutional right,'" and going on to conclude that "Brinkley has not made the requisite showing." Appellant then timely petitioned for a rehearing en banc, and that was denied by the Fourth Circuit and filed by the Clerk on July 31, 2009.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I.

Review Is Warranted Because Statute Of Limitations Provision Of The 28 U.S.C. § 2244, The Federal Anti-Terrorism And Effective Death Penalty Act (AEDPA), Which As Applied, Places Confusing And Unintelligible Timelines Upon The Filing A Prisoner's Constitutional Right To Habeas Corpus, His Right To Effective Assistance Of Counsel Under The Sixth Amendment, And Has The Effect of

Violating Prisoner's Rights Of Equal Protection Under The Fourteenth Amendment As Applied To The States Through The Fifth Amendment.

It is an axiomatic principle of federal constitutional law that a standard of "strict scrutiny" will be applied to any laws passed by the U.S. Congress, or the legislatures of the various states or municipalities in the United States which significantly impinge on fundamental individual rights, and that such legislation will be upheld only if the state proves that it is justified by a "compelling state interest." *See, e.g., Roe v. Wade,* 410 U.S. 113, 153-156 (1973).

It is also axiomatic that the right to assistance of counsel and in fact effective assistance of counsel is a fundamental right afforded to citizens in criminal trials in the United States. *See, e.g., Smith v. Rogerson,* 171 F.3d 569, 572 (8th Cir. 1999); *Gideon v. Wainwright,* 372 U.S. 335 (1963).

The right of habeas corpus is also a constitutional right, which is expressly reserved in the constitution, and found at the so-called "Suspension Clause" at Article 1, Section 9. While there has been considerable debate on the topic of habeas corpus, in *Immigration and Naturalization Service v. St. Cyr,* 533 U.S. 289 (2001), and and more recently in *Boumediene v. Bush,* 553 U.S. ___ (2008), the Supreme Court recently suggested that the Suspension Clause protects "the writ as it existed in 1789," that is, as a writ which federal judges could issue in the exercise of their common law http://en.wikipedia.org/wiki/Common_law authority.

In an attempt to limit a state prisoner's rights of habeas corpus, and thus limiting his fundamental right to effective assistance of counsel to be heard in the federal courts, Congress passed 28 U.S.C. § 2244, which on its face appears to require that a habeas petition be filed within one year of conclusion of direct review by the state courts.

The relevant statute, under which the petition was timely filed, provides in part (d):

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

In considering the plain language of the statute, the petitioner, through counsel, relied upon (d)(1)(A):

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

The problem with the statute is that it violates the standards of the constitution in three respects. First, the statute violates the plain language and the intent of Article 1, Section 9 of the Constitution, which provides in relevant part that "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

In this case, the statute of limitations imposed by 28 U.S.C. § 2244, does in fact constitute a suspension, or at least a partial suspension of the writ, to the extent that a prisoner may seek to exercise his or her right of habeas corpus at a period of time beyond the arbitrary timeframe set by the statute. The Constitution, however, sets no such timeframe, nor does it envision any such timeframe.

There indeed could be times in which a prisoner may need to exercise his right to petition after the arbitrary one year timeframe mandated by

the statute. Thus, because the statute has the effect of violating the "Suspension Clause" of Article 1, Section 9, this court should issue a certificate of appealability, declare it unconstitutional and direct the district court to hear Mr. Brinkley's appeal on the merits.

But above and beyond the impingement upon habeas corpus, is the issue of the statute's unconstitutional impingement upon the fundamental right to effective assistance in criminal cases.

Both in its implementation and in its effect, this statute impinges upon the fundamental right of effective assistance of counsel, by effectively curtailing the opportunity for a petitioner to exercise that right. Indeed, the use of habeas corpus, as a practical matter, is the only effective means that most state prisoners have in order to have an ineffective assistance claim brought before a federal court of the United States.

A statute of limitations on a fundamental right is at the very least, a severe curb upon that right, and any statute curbing a fundamental right, including the fundamental right to effective assistance of counsel, must be undergirded by a compelling state interest. Here, no such articulated compelling state interest exists to justify this curb. Oh perhaps it might be more convenient to the federal courts not to have to process as many habeas corpus claims, but that is not a compelling state interest justifying a curb upon the fundamental right of effective assistance of counsel under the Sixth Amendment, and also upon due process rights of notice and opportunity to be heard under the Fifth Amendment. For this reason, the statute should be

stricken by this court as unconstitutional, and Mr. Brinkley's claims should be heard on the merits.

Finally, the statute should be stricken as unconstitutional because of the *effect* that it has had in suppressing a prisoner's fundamental rights to effective assistance of counsel under the sixth amendment, and the due process rights of notice and opportunity to be heard under the Fifth Amendment.

Since the passage of the Act, the widely varying effect it has had across the nation has been a quagmire, resulting in tons of litigation in which courts, lawyers and judges have tried to figure decipher exactly what the deadline for asserting a prisoner's rights are under the statute. What on its face seems to be a simple proposition, has led to dozens of lawsuits and appellate challenges in the federal courts around the country with differing and confusing interpretations on the topics of "pending time" and time that isn't pending, all because the interpretation of such matters are extremely confusing and difficult to understand.

On the issue of "pending," and thus whether time does or does not count to end a fundamental right of due process and effective assistance, litigation has cropped up not only in the U.S. Supreme Court – Carey v. Saffold, 536 U.S. 214 (2002); Woodford v. Garceau, 538 U.S. 202 (2003), but many other cases with differing interpretations and opinions based on varying factual nuances. Saffold v. Carey, 312 F.3d 1031 (9th Cir. 2002), Brown v. Poole, 337 F.3d 1155 (9th Cir. 2003), Biggs v. Duncan, 339 F.3d 1045 (9th Cir. 2003), Delhomme v. Ramirez, 340 F.3d 817 (9th Cir. 2003), Jenkins v. Johnson, 330 F.3d 1146, 1155 (9th Cir. 2003), Welch v. Carey, 350 F.3d 1079, 1080 (9th Cir. 2003), Chavis

v. LeMarque, 382 F.3d 921 (9th Cir. 2004), Gaston v. Palmer, 387 F.3d 1004 (9th Cir. 2004), King v. Roe, 340 F.3d 821 (9th Cir. 2003), Isley v. Arizona Department of Corrections, 383 F.3d 1054 (9th Cir. 2004), Voravongsa v. Wall, 349 F.3d 1 (1st Cir. 2003), Ellzey v. United States, 324 F.3d 521 (7th Cir. 2003), Grillette v. Warden, 372 F.3d 765 (5th Cir. 2004), Moore v. Crosby, 321 F.2d 1377 (11th Cir. 2003), Melancon v. Kaylo, 259 F.3d 401, 407 (5th Cir.2001), Gibson v. Klinger, 232 F.3d 799, 804 (10th Cir.2000), Fernandez v. Sternes, 227 F.3d 977, 981 (7th Cir.2000), Lookingbill v. Cockrell, 293 F.3d 296 (5th Cir. 2002), Rouse v. Lee, 339 F.3d 238 (4th Cir. 2003) (en banc), And this is only a *partial* list of courts trying to get hold of when and how to count and classify the notion of "pending," for purposes of determining whether a prisoner may have his or case heard.

It should not be so difficult to interpret a statute which impinges upon a fundamental constitutional right, as this statute does. The effect of this statute, as shown by the explosion of litigation attempting to interpret various timeframes, has crippled the rights of dozens of persons, including potentially the Petitioner, in asserting the fundamental due process right to be heard and to have the federal courts, ultimately, protect the right to effective assistance of counsel as guaranteed by the Sixth Amedment. For this reason alone, this court should declare the statute to be unconstitutional and issue a certificate of appealability.

Moreover, the statute and it's interpretation has led to different interpretations in different states, as states often have different definitions of

"pending." The definition of "pending" may change from state to state, in that different statutory schemes adopted by different states. For instance, – in Carey v. Saffold this court discusses California's PCR proceedings indigenous to that state, while in Rouse v. Lee, 339 F.3d 238 (4th Cir. 2003), the Fourth Circuit relied on an affidavit from the North Carolina Supreme Court concerning that's states general practice not to issue mandates following summary denials of certiorari. Interpretations are different in Califorina versus North Carolina versus other states, and some prisoners in some states thus get more preferable treatment on filing timeline issues than prisoners in other states. That is not fair and it certainly violates the Constitutiona right of all Americans, and yes even all prisoners, to equal protection of the law.

Thus based upon this statute, and its varying interpretations, citizens in one state may be able to exert a fundamental right to be heard and to protect his or her right to effective assistance of counsel, while a citizen in another state may not have that right, simply because the statutory scheme of one state may differ from another. In the landmark case of Bush v. Gore, 531 U.S. 98 (2000), this court found that different standards of ballot counting throughout Florida violated the Equal Protection Clause. By the same token, the different standards applied in different states to determine whether a matter is "pending" for purposes of whether a prisoner can assert a fundamental constitutional right, is also a violation of the Equal Protection clause of the Fifth Amendment.

Thus the statute, by in practice relying upon differing standards in different states, violates the

Equal Protection Clause, and this court should thus declare the statute to be unconstitutional and a certificate of appealability should be granted.

For the foregoing reasons, this court should declare the statute of limitations provision of the AEDA, as set forth at 28 U.S.C. § 2244 to be unconstitutional, and should remand with instructions to the lower court to hear Mr. Brinkley's claim for ineffective assistance of counsel.

CONCLUSION

Based on the foregoing, Petitioner respectfully submits that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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No. _____

In The
Supreme Court of the United States

ALONZO R. BRINKLEY, II,

Petitioner,

v.

JON OZMINT,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

APPENDIX

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UNPUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ALONZO R. BRINKLEY, II, Petitioner -Appellant,
v.
JON OZMINT, Respondent -Appellee.

Appeal from the United States District Court for the District of South Carolina, at Greenville. Joseph F. Anderson, Jr., Chief District Judge. (6:08-cv-00308-JFA)

Submitted: June 18, 2009 Decided: June 25, 2009

Before NIEMEYER, GREGORY, and DUNCAN, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Donald Mitchell Brown, Jr., BROWN & ASSOCIATES, PLLC, Charlotte, North Carolina, for Appellant. William Edgar Salter, 111, Assistant Attorney General, Columbia, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Alonzo R. Brinkley, II, seeks to appeal the district court's order accepting the recommendation of the magistrate judge and dismissing Brinkley's 28 U.S.C. § 2254 (2006) petition as untimely filed. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. U.S.C. S 2253 (c) (1) (2006). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253 (c) (2) (2006). A prisoner satisfies this standard by demonstrating that reasonable jurists would find that any assessment of the constitutional claims by the district court is debatable or wrong and that any dispositive procedural ruling by the district court is likewise debatable. --Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003) ; Slack v. McDaniel, 529 U.S. 473, 484 (2000) ; Rose v. Lee, 252 F.3d 676, 683-84 (4th Cir. 2001). We have independently reviewed the record and conclude that Brinkley has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal, dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED

B1

FILED: June 25, 2009

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 09-6551 (6:08-cv-00308-JFA)

ALONZO R. BRINKLEY, II, Petitioner -Appellant

v.

JON OZMINT, Respondent -Appellee

JUDGMENT

In accordance with the decision of this Court, a certificate of appealability is denied and the appeal is dismissed.

This judgment shall take effect upon issuance of this Court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR. CLERK

June 31, 2009

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ALONZO R. BRINKLEY, II, Petitioner -Appellant
v.
JON OZMINT, Respondent -Appellee

ORDER

The petition for rehearing en banc was circulated to the full Court. No judge requested a poll under Fed. R. App-P. 35. The Court denies the petition for rehearing en banc.

For the Court /s/ Patricia S. Connor, Clerk

FILED: August 10, 2009

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 09-6551
(6:08-cv-00308-JFA)

M A N D A T E

The judgment of this Court, entered June 25, 2009, takes effect today. This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

/s/Patricia S. Connor, Clerk

EJ

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA GREENVILLE DIVISION

Alonzo R. Brinkley, II, #271143,
Petitioner,

v.

Jon Ozmint,
Respondent.

Civil Action No. 6:08-308-JFA-WMC

REPORT OF MAGISTRATE JUDGE

The petitioner, a state prisoner proceeding with the assistance of counsel, seeks habeas corpus relief pursuant to Title 28, United States Code, Section 2254.

Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1)(B), and Local Rule 73.02(B)(2)(c), D.S.C., this magistrate judge is authorized to review posttrial petitions for relief and submit findings and recommendations to the District Court.

BACKGROUND OF THE CASE

The record reveals that the petitioner is currently confined in the Perry Correctional Institution of the South Carolina Department of Corrections ("SCDC"), as the result of his York County, South Carolina, armed robbery conviction.

The York County Grand Jury indicted the petitioner at the June 2000 term of court for armed robbery (00-GS46-2056); unlawful carrying of a pistol (00-GS-46-2057); entering a bank with intent to steal (00-GS-46-2058); failure to stop for a blue light (00-GS-46-2059), resisting arrest (00-GS-462060); two counts of assault and battery with intent to kill (ABIK) (00-GS-46-2061 and 00GS-46-2062); possession of a stolen vehicle (00-GS-46-2063); and possession of a firearm during the commission of a violent crime (00-GS-46-2064). Attorney Jack B. Swerling represented him on these charges.

On November 30, 2000, the petitioner pleaded guilty before the Honorable John C. Hayes, III, to armed robbery, unlawful carrying of a pistol, failure to stop for a blue light, resisting arrest, two counts of assault and battery of a high and aggravated nature (ABHAN), possession of a stolen vehicle and possession of a firearm during the commission of a violent crime. Judge Hayes sentenced him to 20 years for armed robbery, one year for unlawful carrying of a pistol, three years for failure to stop for a blue light, one year for resisting arrest, 10 years for each count of assault and battery of a high and aggravated nature, 10 years for possession of a stolen vehicle, and five years for possession of a firearm during the commission of a violent crime. Judge Hayes ordered that all of the sentences were to be concurrent.

The petitioner timely served and filed a notice of appeal. Attorney Patricia Greene Pegram represented him on appeal. On May 29, 2001, Ms. Pegram filed a final *Anders* brief of appellant on the

petitioner's behalf and petitioned to be relieved as counsel.[1]

The only issue raised in the *Anders* brief was stated as follows :

WAS THE ISSUE OF WHETHER MR. BRINKLEY'S PLEA WAS KNOWING AND INTELLIGENT OR ANY OTHER ISSUE PRESERVED FOR DIRECT APPEAL?
Final *Anders* brief of appellant at p. 1.

On May 1, 2002, the South Carolina Court of Appeals filed an unpublished opinion dismissing the petitioner's appeal and granting counsel's petition to be relieved. *State v. Brinkley*, 2002-UP-314 (S.C. Ct.App., May 1, 2002). The South Carolina Court of Appeals sent the remittitur to the York County Clerk of Court on June 3, 2002.

The petitioner thereafter filed a *pro se* post-conviction relief ("PCR") application (02-CP-46-2457) on October 22, 2002. *See Gary v. State*, 347 S.C. 627, 557 S.E.2d 662 (2001) (mailing of a PCR application does not constitute filing, for statute of limitations purposes. Rather, application is filed when received by the Clerk of Court). He alleged the following grounds for relief in his application:

1
Anders v. California, 386 U.S. 738 (1967).

(1) Ineffective assistance of counsel in that (1) defendants counsel at trial gave faulty advise on the length of sentence which included the defendant to plead guilty a) Counsel on this case provided incorrect information to the defendant concerning plea options, including information that the defendant receive 50 to 60 years incarceration. Based upon this incorrect advice, the defendant accepted a deal with the state capping his sentence at 20 years. Defendant would not have pled guilty had he been given accurate information by counsel. Additionally, counsel advised the defendant to plead guilty before he had received the results of critical neurological tests, which subsequently would have provided the defense on the merits to these charges. Counsel's advise to accept such a plea prior to the receipt of such testing constitutes ineffective assistance of counsel which is a violation of the defendant's sixth amendment rights under the United States Constitution.
(2) Counsel did [not] inform defendant ... in a timely manner and did not bring forth evidence or inform the defendant concerning a neurological condition which could have established a defense on the merits to the charges. Defendant would not have plead guilty but for counsels deficient performance. *COB Lockhart,* 474 U.S. 52 (1985). The Defendant pled guilty and sentencing was imposed in this case on November 30, 2000. (See Sentencing Sheet dated 30 Nov 2001 Attached hereto as Exhibit E). However, in a letter of November 29, 2002, counsel informed the solicitor that based on recent medical results, defendant had been suffering from brain damage which cause him to act in a matter which are not voluntary (See Attorney Jack Swerling's letter to

Kevin S. Brackett, dated 29 November 2000 at page 3, paragraphs 3 and 4, attached hereto as Exhibit F).

a) Neither Defendant nor his family were aware of the extent of this condition. On December 6, 2000, Dr. Gero Spencer Kraugh, MD, Columbia Neurologist, provided a written report diagnosing defendant with a condition known as "Static encehpalopathy" caused by " repeated head and neck trauma."

(3) Additionally, there exist evidence of material facts, not previously presented and heard, requires vacation of the conviction or sentence in the interest of justice.

a) [D]efendant answered in the plea inquiry that he had not ever been treated for mental or emotional disabilities. In fact, he had been extensively treated for such disabilities and this fact should have been brought to the attention of the court. Defendant had previously been treated by a Dr. Alan Towbin, a psychologist in New Haven, Connecticut. Dr. Towbin sent his notes to a psychologist working with Mr. Swerling, a Dr. Harold C. Morgan of Columbia. This fact should have been brought before the court but was not, further bolstering defendant's claim for ineffective assistance.

The State filed its return on March 1, 2004. The Honorable Lee S. Alford held an evidentiary hearing into the matter on July 20, 2004, at the Moss Justice Center in York County, South Carolina. The petitioner was present at the hearing; and attorney Donald M. Brown, Jr., represented him. Assistant Attorney General Arie D. Bax represented the State. The petitioner testified on his

own behalf, He also presented then-Deputy Assistant Solicitor Kevin Brackett of the Sixteenth Circuit Solicitor's Office; Shelly Brinkley, the petitioner's mother; Allen Mills, his uncle; and Dr. Gero Spencer Kragh, a neurologist. Trial counsel, Mr. Swerling, testified on behalf of the State.

On October 7, 2004, Judge Alford filed an order in which he denied relief and dismissed the application with prejudice. The order of dismissal addressed the petitioner's claims that his plea was involuntary and trial counsel was ineffective because he failed to (1) properly inform the petitioner that the State had offered an alternative of a cap of 30 years on the straight up plea; and (2) present evidence concerning a neurological condition, from which the petitioner suffered, that rendered him guilty but mentally ill (GBMI).

A timely notice of appeal was served and filed. Again, Mr. Brown represented the petitioner in collateral appellate proceedings. The petitioner filed petition for writ of certiorari on March 23, 2005. The petitioner argued six issues on certiorari:

(1) Did defense counsel violate the petitioner's Sixth Amendment Right to Effective Assistance of Counsel by making a mistake in his advice in calculating sentencing at the plea hearing in November of 2000?

(2) Did defense counsel violate the petitioner's Sixth Amendment Right to Effective Assistance of Counsel by communicating incorrect information to Petitioner, then catching his mistake only minutes before the hearing, at a time when Petitioner was suffering from a brain condition and when he was unable to comprehend the sentencing advice?

(3) Did defense counsel violate the petitioner's Sixth Amendment Right to Effective Assistance of Counsel by proceeding to sentencing without complete medical reports from Petitioner's physician, when such reports subsequently showed that the Petitioner was suffering from a brain condition that affected his ability to know right from wrong at the time of the underlying offenses?
(4) Did the court err by summarily finding that Dr. Kragh was not credible, when it recognized Dr. Kragh as an expert and when there was no expert testimony presented by the State to contradict Dr. Kragh's expert opinion?
(5) Was the credibility of Dr. Kragh an issue reserved primarily for the court during the PCR proceeding or is it an issue primarily for a jury during the trial on the merits?
(6) Was the petitioner's Sixth Amendment Right to Effective Assistance of Counsel violated because a jury was not allowed to consider the testimony of Dr. Gerald Kragh?

The State filed a return to petition for writ of certiorari on July 27, 2005. The petitioner filed a reply on August 18, 2005.[2]

The South Carolina Court of Appeals denied certiorari in an order filed on September 14, 2006. The South Carolina Court of Appeals denied a timely petition for rehearing on January 24, 2007.

[2]Jurisdiction was transferred from the South Carolina Supreme Court to the South Carolina Court of Appeals after the parties had filed their pleadings.

On February 23, 2007, the petitioner filed a petition for writ of certiorari. The three questions presented in the petition for writ of certiorari were stated as follows:
(1) Did the Court of Appeals err in holding that Defense Counsel was not ineffective in failing to understand and communicate accurately the plea option?
(2) Did the Court of Appeals err in holding that Defense Counsel was not ineffective in failing to move for a continuance to receive Dr. Kragh's report?
(3) Did the Court of Appeals err in holding that Defense Counsel was not ineffective by leaving a valuable defense on the table thereby failing to render reasonably effective assistance under prevailing professional norms and that the petitioner-appellant was therefore prejudiced?

The State filed a return to petition for writ of certiorari on April 6, 2007.
The South Carolina Supreme Court filed an orderdenying certiorari on May 24, 2007. The South Carolina Court of Appeals also sent the remittitur to the York County Clerk of Court on May 24, 2007.

In his action now before this court, the petitioner raises the following allegations:
GROUND ONE: Petitioner's defense counsel violated the Petitioner's Sixth Amendment Right to Effective Assistance of Counsel by making a mistake in his advice in calculating sentencing at the plea hearing in November of 2000.
GROUND TWO: Petitioner's defense counsel violated the Petitioner's Sixth Amendment Right to Effective Assistance of Counsel by communicating

incorrect information to Petitioner, then catching his mistake only minutes before the hearing, at a time when Petitioner was suffering from a brain condition and when he was unable to comprehend the sentencing advice.

GROUND THREE: Petitioner's defense counsel violated the Petitioner's Sixth Amendment Right to Effective Assistance of Counsel by proceeding to sentencing without complete medical reports from Petitioners physician, when such reports subsequently showed that the Petitioner was suffering from a brain condition that affected his ability to distinguish his ability to know right from wrong at a time of the underlying offenses.

GROUND FOUR: The court erred by summarily finding that Dr. Kraugh was not credible, when it recognized Dr. Kraugh as an expert and when there was no expert testimony presented by the State to contradict Dr. Kraugh's expert opinion.

GROUND FIVE: The Petitioner's Sixth Amendment Right to Effective Assistance of Counsel violated because a jury was not allowed to consider the testimony of Dr. Gerald Kraugh. (petition 2-3).

On April 21, 2008, the respondent filed a motion for summary judgment. On May 6, 2008, the petitioner, through his counsel, Donald M. Brown, Jr., filed a consent motion for extension of time to respond to the motion for summary judgment. By order of this court filed May 6, 2008, the deadline for the response was extended through May 23, 2008. The petitioner filed his response on May 23, 2008.

APPLICABLE LAW

Title 28, United States Code, Section 2254(d) and (e) provides in pertinent part as follows:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.
Title 28, United States Code, Section 2244(d), provides:
(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing such State action;
(C) the date on which the constitutional right

asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

ANALYSIS

The respondent argues that the petition is untimely under the one-year statutory deadline set forth in the Antiterrorism and Effective Death Penalty Act ("AEDPA"). This court agrees. The one-year time period runs from the latest of "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). The petitioner's conviction became final on June 3, 2002, when the South Carolina Court of Appeals remitted the case to the trial court. Accordingly, the limitations period expired on June 3, 2003, unless the period was at any time tolled for any properly filed state PCR application. 28 U.S.C. § 2244(d)(2).

The petitioner filed a state PCR action (02-CP-46-2457) on October 22, 2002. At that point, 141 days of non-tolled time had run since the period of limitations began on June 3, 2002. Proceedings in the state PCR action concluded when the South Carolina Court of Appeals sent the remittitur to the York County Clerk of Court on May 24, 2007. At that point, statutory tolling for the state PCR action concluded, and the statute of limitations began to run again. The petitioner filed his petition for writ of habeas corpus in this court, through counsel, on January 30, 2008. This was 251 days after the state PCR proceedings concluded and 392 (141+251) days after his state court convictions became final. Accordingly, as the federal petition was filed after the one-year statute of limitations expired, the petition is untimely and should be dismissed.

The petitioner argues that the "indisputably . . . agreed upon date for 'conclusion of direct review'" of his case was May 24, 2007, and thus he had until May 24, 2008, to file his federal petition (pet. brief 4). The petitioner further argues, "Even the state conceded in its brief that 'Proceedings in 02-CP-46-2457 concluded with [sic] the state court of appeals sent the Remittitur to the York County Clerk of Court on May 24, 2007'" (pet. brief 3). The record before this court shows that *direct review* of the petitioner's case concluded on June 3, 2002, when the state court of appeals remitted the case to the trial court. It was the petitioner's PCR action (02-CP-46-2457) that concluded on May 24, 2007. Title 28, United States Code, Section 2244(d), is clear that the statute of limitations begins running at the conclusion of *direct review* and is statutorily tolled for any properly filed

state PCR action. The one-year statute of limitations begins to run on the date the petitioner's conviction becomes final, not at the end of collateral review. *Harris v. Hutchinson*, 209 F.3d 325, 327 (4th Cir.2000).

The petitioner, through counsel, argues that the state is attempting to wrongly "lop off" the 141 days between the conclusion of direct review of his case and the filing of his state PCR action (pet. brief 4-12). In support of the argument, the petitioner relies on *Carey v. Saffold*, 536 U.S. 214 (2002). In *Saffold*, the United States Supreme Court considered the question of whether an application for state collateral review is pending during the time between a lower state court's decision and the filing of a notice of appeal to a higher state court. *Id.* at 217. The Court answered the question in the affirmative. *Id.* at 227. It is unclear to this court how the ruling in *Saffold* is in any way applicable to the petitioner's case. This court has considered the petitioner's state PCR case to be pending from the date of its filing all the way through to the remittitur to the county clerk of court. The holding in *Carey* in no way applies to the time lapse between the conclusion of direct review of the petitioner's case and the filing of his state PCR action. The petitioner contends, "The States wants to argue, in effect, that the claim was 'not pending' in the state courts

between June 2[3] [the conclusion of direct review] and October 22, 2002, [the date the state PCR action was filed] and therefore, in this interval of time, it wants to lop off 141 days from the full year guaranteed petitioner by 28 U.S.C. § 2244(d)(1)(A)" (pet. brief 6).

The court stated as follows:

> This argument is meritless. The Eighth Circuit Court of Appeals considered just such an argument in *Boston v. Weber*, Essentially, Boston argues for retroactive tolling, which effectively means the AEDPA statute of limitations would not begin to run until after the conclusion of the state habeas proceedings so long as the state habeas application is filed within one year of the judgment becoming final. . . . We disagree.
>
> First, Boston's reliance on *Saffold* is misplaced. In *Saffold*, the Supreme Court held that, upon filing a state habeas application, the application is "pending" until the completion of the state collateral review process. 536 U.S. at 219-21. *Saffold* does not support Boston's argument because it did not address the time period between the date the judgment became final and the date of filing an application for state collateral review. To extend *Saffold* to exclude this time period as Boston seeks would thwart AEDPA's purpose to "reduce delays in the execution of state and federal criminal

[3]This is evidently a typographical error by the petitioner as the case was remitted to the trial court on June 3, 2002. 525 F.3d 622 (8th Cir. 2008).

sentences," *Rhines v. Weber*, 544 U.S. 269, 276 (2005) (quotation omitted), without furthering the goals of "comity, finality, and federalism," *Saffold*, 536 U.S. at 220 (quotation omitted).
Id. at 624-25 (parallel citations omitted).
The parties agree that equitable tolling is not an issue in this case (pet. brief 12; resp. brief 10-12). Based upon the foregoing, the petition is untimely and should be
dismissed.

CONCLUSION AND RECOMMENDATION

Being "mindful that Congress enacted § 2244(d) 'with the ... purpose of curbing the abuse of the statutory writ of habeas corpus,'" *Allen v. Mitchell*, 276 F.3d 183, 186 (4th Cir. 2001) (quoting *Crawley v. Catoe*, 257 F.3d 395, 400 (4th Cir. 2001)), this court concludes that the petition in this case was untimely filed, even when properly tolled.

Wherefore, based upon the foregoing, it is recommended that the respondent's motion for summary judgment (doc. 7) be granted. *See Rouse v. Lee*, 339 F.3d 238, 257 (4th Cir. 2003), *cert. denied*, 541 U.S. 905 (2004) (affirming dismissal of petition filed one day late).

s/William M. Catoe United States Magistrate Judge
February 5, 2009 Greenville, South Carolina

UNITED STATES DISTRICT COURT DISTRICT
OF SOUTH CAROLINA

Alonzo R. Brinkley, II, #271143,

Petitioner,

v.

Jon Ozmint,

Respondent.

Civil Action No. 6:08-308-JFA-WMC

ORDER

The petitioner, through retained counsel, filed this action seeking relief under 28 U.S.C. § 2254. He challenges his state court conviction following his guilty plea to armed robbery, unlawfully carrying a pistol, failure to stop for a blue light, resisting arrest, two counts of assault and battery with intent to kill, possession of a stolen vehicle, and possession of a firearm during the commission of a violent crime. Brinkley received a 20-year sentence on these convictions.

The Magistrate Judge assigned to this action[1] has prepared a thorough Report and Recommendation and opines that the respondent's motion for summary judgment be granted as the petition is untimely. The Report sets forth in detail the relevant facts and standards of law on this matter, and the court incorporates such without a recitation.

Under the local rules for this district, the petitioner had 10 days from the filing of the Report within which to file objections. The ten-day deadline expired on February 23, 2009. On February 23, 2009, this court received a motion from petitioner for leave to file "supplemental briefings" in this case. The motion suggests that supplemental briefings "may be helpful to the court to flesh out crucial legal issues germane to the procedural history of this case."

[1] The Magistrate Judge's review is made in accordance with 28 U.S.C. § 636(b)(1)(B) and Local Civil Rule 73.02. The Magistrate Judge makes only a recommendation to this court. The recommendation has no presumptive weight, and the responsibility to make a final determination remains with the court. *Mathews v. Weber*, 423 U.S. 261 (1976). The court is charged with making a *de novo* determination of those portions of the Report and Recommendation to which specific objection is made, and the court may accept, reject, or modify, in whole or in part, the recommendation of the Magistrate

Judge, or recommit the matter to the Magistrate Judge with instructions. *See* 28 U.S.C. § 636(b)(1).

The proper way to file "briefs" with regard to a Report and Recommendation of a Magistrate Judge is to take exception thereto. Here, counsel has waited until the deadline for filing objections and suggested that "additional briefing" would be helpful.

The court has carefully reviewed the Report and Recommendation and finds no basis for disturbing the Magistrate Judge's recommended disposition of this case. Moreover, the petitioner has failed to comply with the deadlines set for challenging the Report and Recommendation.

The Magistrate Judge concludes that the petitioner's claim must be barred because it was not timely filed under the one-year statute of limitations created by the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub.L.No. 104-132, 110 Stat. 1214 ("AEDPA"). In addition, the Magistrate finds no showing by the petitioner that would entitle him to equitable tolling. The AEDPA provides a one-year statute of limitations period on the filing of a § 2254 action. Subsection (d) of the statute reads:

(D)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of–

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an

application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) The date on which the constitutional right was asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) The date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for state post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d)(1).

The petitioner's conviction became final on June 3, 2002 when direct review of his case concluded. Accordingly, the limitations period expired one year later on June 3, 2003 unless the period was at any time tolled for any properly filed state PCR application.

The petitioner filed his first state PCR action on October 22, 2002. At that point, 141 days of non-tolled time had run since June 3, 2002. Proceedings in the state PCR action concluded on May 24, 2007 when the South Carolina Court of Appeals sent the remittitur to the York County Clerk of Court. On

that date, the statutory polling for the state PCR concluded and the AEDPA statute of limitations began to run again.

The petitioner filed the present habeas action through counsel on January 30, 2008. This was 251 days after the state PCR proceedings concluded and 392 days after his state court convictions became final, which was beyond the statute of limitations period provided in the AEDPA. Therefore, no equitable tolling can be applied to the petitioner.

Under the standards set forth in *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005), the Magistrate Judge did not find that the petitioner had pursued his rights diligently and that some extraordinary circumstance stood in his way to entitle him to further equitable tolling.

After a careful review of the record, the applicable law, and the Report and Recommendation, the court finds the Magistrate Judge's recommendation to be proper and incorporates the Report herein by reference. The respondent's motion for summary judgment is hereby granted and the petition is dismissed as untimely under § 2244(d)(1). The motions for leave to file additional briefing and a hearing are denied as well.

IT IS SO ORDERED.

February 26, 2009 Columbia, South Carolina,

Joseph F. Anderson, Jr., United States District Judge